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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 537

GLENSHAW GLASS COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now COMES Glenshaw Glass Company, Inc., petitioner, by its duly authorized attorneys, and prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered on October 21, 1947. (R. 168.)

In support of this petition your petitioner respectively shows:

OPINIONS BELOW

The Tax Court of the United States prepared a Memorandum Findings of Fact and Opinion. (R. 156.) It is not

officially reported. The Circuit Court of Appeals affirmed *per curiam* without an opinion. (R. 167.)

JURISDICTION

This Court's jurisdiction is invoked pursuant to Section 1141(a) of the Internal Revenue Code, 53 Stat. 164, and the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, amending and reenacting Section 240(a) of the Judicial Code, 28 U.S.C. § 347.

SUMMARY STATEMENT OF MATTER INVOLVED

This case presents *first* the issue of whether the Administrative Procedure Act[1] governs the judicial review of decisions of the Tax Court, and, if so, whether the scope of that review has been enlarged thereby, and, *second,* the issue of whether the Tax Court's findings of fact must comply with the criteria announced in *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80 (1943); *id.* 332 U. S. 194 (1947).

On November 7, 1944, the respondent determined a deficiency in the petitioner's income and excess profits taxes for the taxable years ended September 30, 1941 and 1942. (R. 4-8.) The deficiency was predicated upon the determination that the deductions claimed for officers' salaries were excessive and unreasonable.

On October 15, 1946, the Tax Court entered its Memorandum Findings of Fact and Opinion. (R. 156-165.) The Tax Court found that the total compensation paid by petitioner to its executive officers in the taxable year 1941 constituted reasonable compensation. The claimed deduction

[1] 5 U.S.C. § 1001, 60 Stat. 237 (1946).

was accordingly allowed. The same deduction was allowed for the taxable year 1942, but the deduction of an additional amount paid in that year was disallowed on the ground that the petitioner had not sustained its burden of proving that the payment of that additional amount was not a distribution of corporate profits in the guise of compensation for personal services. Although the Tax Court discussed certain evidence bearing upon the issue of whether the disallowed amounts were reasonable as compensation, it made no finding on that issue.

In the Circuit Court of Appeals, petitioner asserted that the Administrative Procedure Act had enlarged the scope of judicial review of decisions of the Tax Court and that by virtue of its provisions the Tax Court's finding that the disallowed payments constituted a distribution of profits in the guise of compensation could not stand. The petitioner also asserted that the Tax Court's decision could not be sustained upon the respondent's alternative theory that the payments were unreasonable as compensation in view of the fact that the Tax Court had not made sufficient findings on that issue. The petitioner, relying upon the *Chenery* cases, *supra,* urged that a remand to the Tax Court was required to enable the Tax Court to consider and determine that question. And even were the findings and opinion of the Tax Court construed to contain a finding that the additional payments were compensation and unreasonable as such, the enlarged scope of judicial review established by the Administrative Procedure Act required a reversal.

The Circuit Court of Appeals affirmed the decision of the Tax Court *per curiam* and without opinion. (R. 167.)

QUESTIONS PRESENTED

1. Whether the Administrative Procedure Act governs the judicial review of decisions of the Tax Court, and, if so, whether the decision below should be reversed.
2. Whether, upon the authority of *Securities and Exchange Commission* v. *Chenery Corporation*, the court below was required to remand the proceedings to the Tax Court for adequate findings upon the issue of whether the disallowed payments were reasonable as compensation.
3. Whether the decision below should be reversed even though it be determined that the Administrative Procedure Act does not govern the judicial review of Tax Court decisions.

REASONS FOR GRANTING CERTIORARI

I.

Whether the Administrative Procedure Act governs the judicial review of Tax Court decisions, and if so, whether it enlarges the scope of that review, are important questions of federal law that have not been but should be settled by this Court.

The question of whether the Administrative Procedure Act governs the judicial review of Tax Court decisions was extensively briefed and argued in the Circuit Court of Appeals. Since that court did not write an opinion, we are unable to determine whether it held the Administrative Procedure Act to be applicable and affirmed under its authority, or held it to be inapplicable and affirmed under the authority of *Dobson* v. *Commissioner* and related cases. In any event, since a factual determination of the Tax Court was presented for review, the decision of the Circuit

Court of Appeals inevitably involved a choice between the standards of the Administrative Procedure Act and the standards of *Dobson* v. *Commissioner* and related cases, or a determination that there was no difference between the two. These are questions of great public importance that have not been but should be settled by this Court.

It is unnecessary to demonstrate to this Court the importance of its determining these questions. Petitions to review decisions of the Tax Court continue to constitute a significant proportion of the work of the Circuit Courts of Appeals.[2] Moreover, confusion exists not only over the application of the standards of *Dobson* v. *Commissioner*[3] but over whether such standards have been replaced by those of the Administrative Procedure Act[4] and, if so, over the difference between those standards.[5]

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[2] Annual Report of the Director of the Administrative Office of the United States Courts (1947) 28.

[3] "As to the Dobson case, there seems to be considerable confusion as to whether it is a precedent for anything, and, if so, for what." Hutcheson, J. in *National Bronx Bank of New York* v. *Commissioner*, 147 F. (2d) 651, 652 (C.C.A. 2d, 1945). *Cf. Brooklyn Nat. Corporation* v. *Commissioner*, 157 F. (2d) 450 (C.C.A. 2d, 1946). See Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, (1945) 58 Harv. L. Rev. 477, 539-543; Note (1947) 60 Harv. L. Rev. 448; Note (1946) 45 Mich. L. Rev. 192.

[4] Contrast e.g. Note (1946) 2 Tax L. Rev. 103 (concluding that the Administrative Procedure Act governs judicial review of Tax Court decisions) with Note (1947) 56 Yale L. J. 670, 686 (predicting a contrary result).

[5] Contrast *Lincoln Electric Company* v. *Commissioner*, 162 F. (2d) 379, 382 (C.C.A. 6th, 1947), with *Anderson* v. *Commissioner*, C.C.A. 7th, Docket Nos. 9084, 9085, decided December 17, 1947, 48-5 CCH Standard Federal Tax Reports, para. 9109. See also O'Connell, J., dissenting in *Commissioner* v. *Church's Estate*, 161 F. (2d) 11, 14 (C.C.A. 3rd, 1947), *cert. granted* ..... U. S. ....., 67 S. Ct. 1738 (1947).

A. The Administrative Procedure Act governs the judicial review of the Tax Court's decision in this case.

Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1001, 60 Stat. 237 (1946), provides for the judicial review of "agency action".[6]

The critical question, therefore, is whether the Tax Court is an "agency". Section 2(a), in so far as pertinent, provides as follows:

> "Sec. 2. As used in this Act—
>
> "(a) Agency.—'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."

The only exception possibly applicable to the Tax Court is that it is a "court" within the meaning of Section 2(a). The statutes of the United States creating the Tax Court and the various amendments thereto, the legislative histories of such statutes, and the decisions of this Court and the Circuit Courts of Appeals make clear that the Tax Court is not a "court" but is an "agency" and, hence, that the Act applies.

The Board of Tax Appeals was established by Section 900 of the Revenue Act of 1924 (43 Stat. 336). To the extent pertinent, that section provided as follows:

> "(a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the 'Board') . . . .
>
> • • •

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[6] Section 2(g) broadly defines "agency action". It is unquestioned that a decision of the Tax Court is "agency action" if the Tax Court is an agency.

For brevity, all sections hereafter referred to, unless otherwise designated, are sections of the Administrative Procedure Act.

> "(k) . . . The Board shall be an independent agency in the executive branch of the Government."

Section 1000 of the Revenue Act of 1926 (44 Stat. 105) amending that section of the 1924 Act, provided in part as follows:

> "The Board of Tax Appeals (hereinafter referred to as the 'Board') is hereby continued as an independent agency in the Executive Branch of the Government."

With this legislation before it, this Court had no difficulty in determining that the Board of Tax Appeals was not a court. In *Old Colony Trust Company* v. *Commissioner*, 279 U.S. 716 (1929), the Court said (at 725):

> "The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the Board has been had and decided."

To the same effect is *Williamsport Wire Rope Company* v. *United States*, 277 U.S. 551, 564-565 (1928).

The Attorney General's Committee on Administrative Procedure in Government Agencies included the Board of Tax Appeals among the government agencies studied.[7]

In 1942 the name of the Board of Tax Appeals was changed to The Tax Court of the United States. That this was a change in name only is abundantly clear from the statute accomplishing the change and the House Committee

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[7] *Report of the Attorney General's Committee on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941); *Monographs of the Attorney General's Committee on Administrative Procedure in Government Agencies*, Sen. Doc. No. 10, part 9, 77th Cong., 1st Sess. (1941).

Report relating thereto. The applicable provision of the Revenue Act of 1942 (56 Stat. 957) is in part as follows:

> "§ 504. Change of Name of Board of Tax Appeals.
>
> * * *
>
> "(b) Powers, tenure, etc., unchanged. The jurisdiction, powers, and duties of The Tax Court of the United States, its divisions and its officers and employees, and their appointment, including the designation of its officers and the immunities, tenure of office, powers, duties, rights, and privileges of the presiding judge and judges of The Tax Court of the United States shall be the same as by existing law provided in the case of the Board of Tax Appeals. . . ."

The Report of the House Ways and Means Committee accompanying the bill when it was reported to the House of Representatives provided in part as follows:

> "Section 504. Change of name of Board of Tax Appeals.
>
> "This section merely changes the names by which the Board of Tax Appeals, its chairman and its members are known. No change is made in its status. The Board, which will hereafter be known as the United States Tax Court, is continued as an independent agency in the executive branch of the Government. Thus, its status as an executive or administrative board is unchanged. *Old Colony Trust Co.* v. *Commissioner* (279 U.S. 716, 725 (1929)). The members of the Board will hereafter be known as the presiding judge and the judges of the United States Tax Court." (H. Rep. No. 2333, 77th Cong. 2nd Sess., pp. 172-173).

The present statute accordingly reads as follows:

> "§ 1100. Status.
>
> "The Board of Tax Appeals (hereinafter referred to as the 'Board') shall be continued as an independent agency in the Executive Branch of the Government.

> The Board shall be known as The Tax Court of the United States and the members thereof shall be known as the presiding judge and the judges of the Tax Court of the United States." (26 U.S.C.A. § 1100 (1946 Pocket Part))

Following the change of name of the Board of Tax Appeals, this Court again had occasion to characterize its status as that of an independent agency in the executive branch of the government. In *Commissioner of Internal Revenue* v. *Gooch Milling & Elevator Co.*, 320 U.S. 418 (1943), the question was whether the Board of Tax Appeals had the authority to apply a prior tax over-payment against a tax deficiency. This Court took cognizance of the change of name of the Board in a footnote which reads as follows (at 418):

> "Section 504(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, 957, changed the name of the Board of Tax Appeals to The Tax Court of the United States. Section 504(b) provided that this change in name was to have no effect on the jurisdiction, powers and duties of the agency. See also H. Rep. No. 2333, 77th Cong., 2nd Sess., pp. 172-173."

The Court then went on to say (at 420):

> "The Board is but 'an independent agency in the Executive Branch of the Government,' and the legislative pattern of its jurisdiction is clear and unambiguous."

To the same effect are *Hutchings-Sealy Nat. Bank* v. *Commissioner*, 141 F. (2d) 422, 423-424 (C.C.A. 5th, 1944); *West* v. *Commissioner*, 150 F. (2d) 723, 727 (C.C.A. 5th 1945) *cert. den.* 326 U.S. 795 (1946).

Moreover, in *Dobson* v. *Commissioner*, 320 U.S. 489 (1943), this Court made clear that the standards there announced for the judicial review of Tax Court decisions were

predicated upon the status of the Tax Court as an administrative agency.[8]

Thus, prior to the passage of the Administrative Procedure Act, Congress and the courts had with unbroken consistency carefully characterized the Tax Court as an "agency" and had expressly rejected the notion that it was a "court". Accordingly, the plain meaning of these terms in Section 2(a) requires the conclusion that the Tax Court is subject to the provisions of the Act. Under these circumstances, a resort to its legislative history as an extrinsic aid to construction is both unnecessary and inappropriate. *Packard Motor Car Company* v. *National Labor Relations Board,* 330 U.S. 485 (1947).[9]

Even if reference were made to the legislative history of Section 2(a), that history would have to be conclusive to

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[8] In the *Dobson* case this Court said:

> "Another reason why courts have deferred less to the Tax Court than to other administrative tribunals is the manner in which Tax Court finality was introduced into the law. (at 495)
>
> • • •
>
> "... every reason ever advanced in support of administrative finality applies to the Tax Court. (at 498)
>
> • • •
>
> "... Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. (at 499)
>
> • • •
>
> "However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court." (at 501)

[9] In that case the Court said (at 492):

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

And see *Gemsco, Inc.* v. *Walling,* 324 U. S. 244, 260 (1945).

overcome the compelling force which must be attributed to the plain meaning of the statutory language and the prior authoritative determinations of the Tax Court's status as an agency. As a matter of fact, the legislative history preponderates in favor of a Congressional intention to include the Tax Court within the coverage of the Act.

During the course of the explanation of the bill on the floor of the Senate by Senator McCarran, Chairman of the Senate Judiciary Committee and chief proponent of the bill in the Senate, the following exchange took place with respect to Section 6(a) of the Act which states that "Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any *agency* proceeding":

> "Mr. Ferguson. Let us consider the Tax Board. Could the Board itself determine that certain individuals were qualified to appear and that other persons were not qualified to appear?
>
> "Mr. McCarran. The answer to that question is 'No'. The Board could not do so. The Board would have to accept lawyers or nonlawyers, as the case might be, because a tax expert may not be a lawyer." (Legislative History, Administrative Procedure Act, Sen. Doc. No. 248, 79th Cong., 2nd Sess., pp. 317-8)[10]

In their consideration of the Administrative Procedure Act, both the House and Senate Judiciary Committees relied heavily upon the Report of the Attorney General's Committee on Administrative Procedure in Government Agencies (*supra* n. 7). The House Committee Report expressly refers to the fact that the Attorney General's Committee included the Board of Tax Appeals among the

[10] The entire legislative history of the Administrative Procedure Act has been reproduced in the one Senate document cited above. For convenience all subsequent references to the legislative history of the Act will be to the page number of Sen. Doc. No. 248.

government agencies studied (Sen. Doc. No. 248, pp. 233, 245-6). Similarly, the Senate Judiciary Committee's print of the bill expressly states that "The Committee has also had the benefit of . . . the monographs issued by the Attorney General's Committee respecting each important Federal agency. . . ." (Sen. Doc. No. 248, p. 11). As heretofore indicated, one of the monographs was devoted to a study of the Board of Tax Appeals (*supra* n. 7). Thus, Congress was clearly conversant with the treatment and recognition of the Board of Tax Appeals as an agency.

Also, the explanation of the term "agency" in the Senate Judiciary Committee's print of the bill states that the term is defined substantially as in *inter alia* the Federal Register Act (Sen. Doc. No. 248, p. 12). The Federal Register Act (44 U.S.C. § 301, 49 Stat. 500) requires the publication in the Federal Register of certain documents promulgated by federal agencies, and this requirement has been construed to be applicable to the Board of Tax Appeals and the Tax Court.[11] The borrowing of this definition for purposes of the Administrative Procedure Act carries with it this consistent and continuous administrative construction.

The evidence relied upon by respondent to indicate that the term "court" as used in Section 2(a) was intended to include the Tax Court is contained in a lengthy appendix to a letter from the Attorney General to the chairmen of the House and Senate Judiciary Committees. Without explanation or discussion to show that the matter had been carefully considered and the relevant data examined, the appendix to the Attorney General's letter merely stated

[11] See the Federal Register Regulations prescribed by the Administrative Committee of the Federal Register (1 CFR Cum. Supp., p. 29). These regulations required the publication in the Federal Register of the Rules of Practice and Procedure of the Board of Tax Appeals. The Tax Court's rules of practice are likewise published in the Federal Register. See *e.g.*, 8 F. R. 1781.

that the term " 'Courts' includes the Tax Court, Court of Customs and Patent Appeals, the Court of Claims and similar courts . . ." (Sen. Doc. No. 248, pp. 224, 408). Such a cursory, cavalier statement cannot be permitted to overcome the pre-existing Congressional and judicial determinations, the plain statutory language of Section 2(a) and the countervailing legislative history.

That letter from the Attorney General should be contrasted with one dated July 3, 1942, from the Attorney General to the Chairman of the House Committee on Ways and Means. In that letter, written in connection with the proposed change of name of the Board of Tax Appeals, the Attorney General said:

> "The Supreme Court has repeatedly characterized it as an administrative body exercising quasi-judicial powers (*Old Colony Trust Co.* v. *Commissioner* (279 U.S. 716; *Goldsmith* v. *Board of Tax Appeals* (270 U.S. 117). Its administrative status has been held sharply to distinguish it from a court. *Cf. Blair* v. *Oesterlein Machine Co.* (275 U.S. 220) with *Williamsport Co.* v. *United States* (277 U.S. 551). Its jurisdiction is limited by statute. It does not have authority to enforce its decisions (*U.S. ex rel. Girard Co.* v. *Helvering* (301 U.S. 540, 542)); nor does it possess any of the inherent powers of a court. It is in no sense a part of the judicial branch of the Government."[12]

The Circuit Court of Appeals for the Sixth Circuit has held the Tax Court to be an "agency" subject to the Administrative Procedure Act. *The Lincoln Electric Company* v. *Commissioner,* 162 F. (2d) 379, 382 (1947).

The Administrative Procedure Act being applicable to the Tax Court, Section 10, providing for the judicial review

[12] Quoted at 93 *Cong. Rec.* 8555 (July 7, 1947).

of agency action, is applicable to this proceeding. Section 12 provides in part that:

> "This Act shall take effect three months after its approval except that Sections 7 and 8 shall take effect six months after such approval. . . ."

The Act was approved on June 11, 1946. All of its provisions except those specifically referred to in Section 12 became effective on September 11, 1946, including, of course, Section 10 relating to judicial review.[13] The petition for review of the decision of the Tax Court in this case was filed in the Circuit Court of Appeals on February 17, 1947. (R. 166.)

B. The scope of judicial review of Tax Court decisions is enlarged by the Administrative Procedure Act.

Section 10(e) provides the starting point for a determination of the scope of judicial review. It is as follows:

> "(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. *It shall* (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) *hold unlaw-*

[13] Section 10(e)(B)(5) provides that the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be "(5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 *or otherwise reviewed on the record of an agency hearing provided by statute.*" That Sections 7 and 8 were not applicable to the Tax Court hearing in this case does not affect the applicability of Section 10(e)(B)(5) to this proceeding since this is a "case . . . otherwise reviewed on the record of an agency hearing provided by statute." 26 U.S.C. §§ 1116, 1141, 53 Stat. 160, 164. The Circuit Court of Appeals for the Sixth Circuit has held Section 10(e) to be applicable under comparable circumstances. *National Labor Relations Board* v. *Thompson Products, Inc.*, 162 F. (2d) 287 (C.C.A. 6th, 1947).

> *ful and set aside agency action, findings, and conclusions found to be* (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) *unsupported by substantial evidence* in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. *In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party,* and due account shall be taken of the rule of prejudicial error." (emphasis supplied)

Although Section 10(e)(B)(5) uses the familiar formulation of "substantial evidence", it is clear that the Act was intended to enlarge in two respects the scope of review of administrative action theretofore followed by the courts. The first aspect of the intended enlargement is that the term "substantial evidence" means precisely what it says and does not mean merely any evidence or a scintilla of evidence. The second aspect is that a reviewing court in determining whether there is substantial evidence in the record to support an agency finding, is required to review the whole record and not simply to examine those items of evidence which support the agency action.

The Report of the Senate Judiciary Committee (Sen. Doc. No. 248, pp. 214, 216-17) states in part as follows:

> "'Substantial evidence' means evidence which on the whole record is clearly substantial, sufficient to support a finding or conclusion under Section 7(c), and material to the issues.
>
> • • •
>
> "The 'substantial evidence' rule set forth in Section 10(e) is exceedingly important. As a matter of lan-

guage, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action, as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required."

Almost identical language is contained in the House Judiciary Committee's Report (Sen. Doc. No. 248, pp. 279 *et seq.*).[16]

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[16] Although Section 10(e) makes perfectly clear that the Circuit Courts of Appeals are required to review the whole record, this is underscored by the following exchange in the course of the House Committee Hearings between Mr. Carl McFarland, Chairman of the American Bar Association's Special Committee on Administrative Law, and Mr. Fadjo Cravens, a member of the House Judiciary Committee:

"Mr. Cravens. I think what we are trying to find out is, in your judgment, based on your experience, is judicial review adequate which is based upon a finding of the reviewing court that there was substantial evidence to support the facts as found by the agency below?

"Mr. McFarland. That is right. That does not mean, as we sometimes hear it said, that they look only to certain pages of the record. You might have in the record something which would sustain the judgment; on the other hand, there might be incontrovertible evidence in the remainder of the record which utterly destroys it. The review must be of the whole record in the sense that any part of the record can be called upon." (Sen. Doc. No. 248, pp. 85-86)

We read the *Scottish-American* case as constituting in so many words a direction to the Circuit Courts of Appeals to look solely to the evidence supporting the Tax Court's findings, and if that be substantial, to affirm.[15] Nothing could be clearer than that the Administrative Procedure Act denies to the reviewing court the right to examine merely the evidence supporting the findings of the Tax Court. All of the evidence relating to the particular issue under attack must be examined. If from an examination of all of the evidence, the findings of the Tax Court can be said to have substantial support, then they must be affirmed.

Further support for the view that an enlargement of the scope of judicial review was intended by the Administrative Procedure Act can be found in the Labor Management Relations Act, 1947,[16] and its legislative history. Section 10(e) of that Act provides that:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The Congressional committee reports relating to this section make it clear that Congress, by the use of this language, intended materially to broaden the preexisting

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[15] "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily upon the evidence in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences and conclusions or it may remand the case to the Tax Court for appropriate proceedings. But if such a basis is present the process of judicial review is at ~~hand~~." *Commissioner* v. *Scottish-American Investment Co., Ltd.*, 323 U. S. 119, 124 (1944)

[16] Pub. L. 101, 80th Cong. 1st Sess., June 23, 1947.

scope of judicial review of the decisions of the agency with which it was dealing.[17] It may be presumed that the use of substantially the same language in the Administrative Procedure Act was prompted by the same intention.

In *The Lincoln Electric Company* v. *Commissioner,* 162 F. (2d) 379 (1947), the Circuit Court of Appeals for the Sixth Circuit concluded that the effect of the Administrative Procedure Act was to broaden the scope of judicial review of Tax Court decisions. The court said:

> "While our conclusion is that review of the Tax Court decisions is governed by the Administrative Procedure Act, it does not become necessary, in view of our reliance upon the *Bingham* case, to particularize in what respect our power to review has been enlarged, except to say that it doubtless has been broadened and that it will be time enough to consider the precise application of the Act when clear-cut questions of fact or mixed questions of fact and law are brought to us for review."

The Circuit Court of Appeals for the Seventh Circuit has reached a contrary conclusion. *Anderson* v. *Commissioner,* C.C.A. 7th, Docket Nos. 9084, 9085, decided December 17, 1947, 48-5 CCH Standard Federal Tax Reports, para. 9109.

Although, strictly speaking, these conclusions in the *Lincoln Electric* and *Anderson* cases were unnecessary to decision and *dicta,* they serve to show the prevailing confusion and to underscore the necessity for a definitive determination by this Court.

We do not consider it appropriate in this petition for certiorari to set out in detail the evidence showing that

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[17] Report of the Senate Committee on Labor and Public Welfare, Sen. Rep. 105, 80th Cong. 1st Sess.; Conference Report on Labor Management Relations Bill, 1947 (H.R. 3020), H. Rep. 510, 80th Cong., 1st Sess.

the standards of the Administrative Procedure Act have not been satisfied by the Tax Court's decision. But it is appropriate to state at least that this case is peculiarly one in which the Tax Court's decision could not stand if tested by the requirement that it be supported by substantial evidence on an examination of the record as a whole. The Tax Court rested its decision upon its conclusion that the petitioner had not sustained its burden of proving that the disallowed payments were not a distribution of corporate profits in the guise of compensation for services. (R. 164.) The findings and opinion are silent as to any rational basis for this conclusion.

By every criterion, the payments that were made constituted compensation and not a distribution of earnings. For example, (1) petitioner's board of directors, among whose members were substantial stockholders, unrelated to those whose compensation is in question and not employed by the petitioner, unanimously approved the payments and characterized them as additional compensation (R. 68-78); (2) a liberal dividend policy was followed both in the taxable year and in prior years (R. 133, 25); (3) general wage increases and bonus payments to a substantial number of other employees had been put into effect by the petitioner in the taxable year (R. 37, 56, 63, 129-131); (4) the payments bore no relationship to stockholdings (R. 138, 29); (5) there were a substantial number of shareholders and the officers receiving the compensation, even with their immediate families, owned only 34.8 percent of the total capital stock of the petitioner (R. 138, 29); and finally (6) although filing sharply specific objections to certain requested findings, the respondent did not object to so much of petitioner's requested findings as stated that the payments were compensation and not a distribution of earnings in the guise of compensation. (R. 154-156.)

This petition presents for the determination of this Court the question of the scope of the judicial review of Tax Court decisions in the light of the Administrative Procedure Act. The public importance of obtaining an early decision by this Court is manifest. In the past five years, numerous decisions of this Court, commencing with the *Dobson* case, have considered the scope of judicial review of Tax Court decisions. Doubt has been cast upon the continued pertinence of many of these decisions by the enactment of the Administrative Procedure Act.

II.

The principle of *Securities and Exchange Commission v. Chenery Corporation* and prior decisions of this Court is applicable to decisions of the Tax Court. The probable conflict between the decision of the court below and those decisions requires the issuance of a writ of certiorari.

The Tax Court made no findings as to whether or not the petitioner's 1942 payments to its executive officers constituted reasonable compensation. This was the only genuine issue presented for its determination. Instead, its decision disallowing a portion of petitioner's 1942 payments rested solely upon its conclusion that the petitioner had failed to satisfy its burden of proving that such payments did not constitute a distribution of earnings in the guise of compensation. (R. 164.) Respondent in its brief below sought to eke out of the Tax Court's findings and opinion as an additional ground for decision a finding that the disallowed amounts were unreasonable as compensation. Because of the manner in which the court below affirmed the decision of the Tax Court, we are unable to ascertain whether the Circuit Court of Appeals reached or decided this question. Numerous decisions of this Court preclude the

reviewing court from encroaching upon the domain of the Tax Court by supplying the findings that the Tax Court failed to make and thereby making specific what the Tax Court left vague.[18]

The Tax Court found that "the compensation paid to the three Meyer executives totaling $67,000 for the fiscal years ending September 30, 1941, and September 30, 1942, respectively, was reasonable." (R. 161.) It is, of course, one thing to find that compensation of $67,000 is reasonable and quite another to find that *only* $67,000 is reasonable, or that *no more than* $67,000 would be reasonable. The Tax Court allowed petitioner's deduction of the $67,000 and the finding as made was essential for that purpose. Having determined that the amounts paid in excess of $67,000 constituted a distribution of profits and were unallowable as such, the Tax Court had no occasion to determine, and did not determine, whether, if such amounts had been compensation, they would have been unreasonable. That the Tax Court did not decide this question is clear from its opinion.

In the Tax Court, following the view of Dean Griswold,[19] petitioner had urged that the Commissioner was without statutory authority to disallow the deduction of compensation paid in good faith as the purchase price for services actually rendered. If the Tax Court had decided that the amounts in excess of $67,000 were compensation and unreasonable as such, it could not have avoided deciding this

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[18] Of course, if this Court should conclude that such findings were made by the Tax Court, the question still remains whether such a determination can stand under the enlarged scope of judicial review provided by the Administrative Procedure Act.

[19] Griswold, *New Light on a "Reasonable Allowance for Salaries"* 59 Harv. L. Rev. 286 (1945).

issue. See, *e.g. Walts, Inc.* v. *Commissioner,* CCH Tax Court Service, Dec. 15,566 (M) (1947). But in view of its conclusion that the amounts paid constituted a distribution of profits rather than compensation, the Tax Court expressly stated that it was unnecessary for it to decide this question. (R. 165.)

Moreover, the disallowance of the amounts paid in excess of $67,000 was made expressly dependent upon the characterization of such amounts as a distribution of profits rather than compensation. (R. 164.) Nowhere else in its findings and opinion, and for no other reason, does the Tax Court disallow these amounts.

The syllabus, which is prepared or approved by the Tax Court Judge as a part of the opinion, states the decision to rest solely upon the ground that the petitioner "has not carried its burden of establishing that such amount was not, in fact, distributed as profits in the guise of compensation." (R. 156.) The syllabus is, we think, clear evidence of what the Tax Court Judge thought that he was deciding and is confirmed by the portions of the opinion described above.[20]

It is true that the Tax Court commenced its opinion with a discussion of certain of the evidence bearing upon the reasonableness as compensation of the amounts paid

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[20] Mabel Owen, the official reporter to the Tax Court for the past twenty years, has advised us that only once in that time has her office been requested to prepare a headnote; that it is the invariable practice in the Tax Court for the headnotes to be prepared by the Judge, or by his law clerk and then approved by the Judge. It is a part of the final opinion as it leaves the Judge's chambers for filing. That this is the Tax Court's practice was confirmed by Mr. Robert C. Tracy, Secretary to the Tax Court.

in 1942 in excess of the $67,000 allowed. It is equally true that its discussion of such evidence had a tone adverse to the petitioner's claim of reasonableness. For example, after again stating in its opinion that the total compensation of $67,000 was reasonable for the year 1941, the Tax Court stated that, "We find, however, no additional facts that would justify an additional increase for the fiscal year ending September 30, 1942."

But this is not a finding on the essential issue of the reasonableness of the deduction in 1942 in the absence of a finding that *no more* than $67,000 was deductible in 1941. The question for the Tax Court is not whether there were additional facts warranting an increase over 1941, but whether the deduction in 1942 was reasonable. Petitioner could very properly, and in our view did, pay its executives less than the maximum reasonable compensation in 1941 and could increase that amount without any change in petitioner's financial position. That is the common situation with respect to the great bulk of salary increases.

The absence of critical findings does not constitute a mere technical omission which may be cured either by the Circuit Court of Appeals or this Court. The necessity for such a finding is a substantive one and goes to the heart both of the administrative process and this Court's power of review.

The decisions of this Court make clear that where essential facts are not clearly found, or the decision is based upon an erroneous ground, the reviewing court will not speculate as to the findings which the administrative agency would have made or substitute another ground upon which the decision could be sustained. In such cases, the proceedings must be remanded for further proceedings

before the administrative agency involved. And this is so even where the opinion of the agency contains intimations or subsidiary findings which permit an inference as to the omitted ultimate finding of fact. Were this not the case, the agency would be relieved of its responsibilities and the reviewing courts rendered unable to discharge theirs.

Nowhere has this basic conception been better stated than in the recent decision of *Securities and Exchange Commission* v. *Chenery Corporation*, 332 U.S. 194 (1947). There the Court said (at 196-7):

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.
>
> "We also emphasized in our prior decision an important corollary of the foregoing rule. If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511, 55 S. Ct. 462, 467, 79 L. Ed. 1023."

To the same effect are *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 94-5 (1943), *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 197 (1941), *Beaumont, Sour Lake & Western Railway Company* v. *United States,* 282 U.S. 74, 86 (1930); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 294 U.S. 499, 510-11 (1935); *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 488-89 (1942); *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 295 U.S. 193, 201-2 (1935).

The Circuit Courts of Appeals, reviewing decisions of the Tax Court, uniformly follow the practice of remanding because of omitted or ambiguous findings. *Lewis* v. *Commissioner,* 160 F. (2d) 839 (C.C.A. 1st, 1947); *Doernbecher Mfg. Co.* v. *Commissioner,* 80 F. (2d) 573 (C.C.A. 9th, 1935).

Regardless of the application of the Administrative Procedure Act, and the scope of judicial review provided thereby, it is of the highest importance that this Court make clear the necessity for unmistakable findings of fact and decision of the issues as a condition precedent to judicial review of Tax Court decisions. If the findings or the basis for decision of the Tax Court are omitted or unclear, the reviewing court is prevented from playing its part in the statutory scheme since it is unable to determine whether the ground of decision is a legally permissible one and whether the findings are supported by legally sufficient evidence. And for the reviewing court to attempt to fill the interstices would be to encroach upon the fact finding duties and responsibilities of the Tax Court.

WHEREFORE, the petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit in the case entitled *Glenshaw*

Glass Company, Inc., petitioner, v. *Commissioner of Internal Revenue*, respondent, No. 9375, in order that this case may be reviewed and determined by this Honorable Court.

GLENSHAW GLASS COMPANY, INC.

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